Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION BY WESTERN MARYLAND COLLEGE, APPELLEE, TO AFFIRM

JOHN H. MUDD,
H. THOMAS HOWELL,
10 Light Street (17th floor),
Baltimore, Maryland 21202,
Attorneys for Appellee,
Western Maryland College.

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Western Maryland College, one of the appellees herein, moves that the judgment of the District Court be affirmed on the ground that it is manifest from the appellants' own disclaimers of record that this appeal presents no substantial question involving the College.

STATEMENT OF THE CASE

Western Maryland College is a private, independent liberal arts college located in Westminster, Maryland, with a full-time enrollment of approximately 1,470 students. It was chartered in 1868 as the first institution south of the Mason and Dixon Line to admit both men and women. The charter requires the College to be operated "upon a most liberal plan, for the benefit of the youth of every religious denomination, who shall be freely admitted to equal privileges and advantages of education and to all of the literary honors of the College, without requiring or enforcing any religious or civil test, nor shall any prejudice be made in the choice of any officer or teacher in the said College on account of his or her particular religious profession, but regard shall be had to his or her moral character, literary abilities, and other necessary qualifications to fill the place for which he or she may be chosen" (R. 1099-1100).[1] Although the College for many years enjoyed a fraternal and mutually-voluntary association with the Methodist Church, it has always been independent and was never governed or controlled by any religious body. The College has completed a process of total disaffiliation and presently maintains no relation with any church (A. 26, n. 2; R. 1105-09).

The Jurisdictional Statement ignores these essential facts, although they were undisputed below. By drawing a composite profile of the five appellee colleges, its effect is to obscure the distinctive characteristics of Western Maryland College. The unreliability of the appellants' factual presentation is illustrated by their failure even to mention the pre-trial concessions sought and obtained by Western Maryland College.

[1] "R" refers to the record on appeal, "A" to appendices to the Jurisdictional Statement, and "T" to the trial transcript (May 29 — June 26, 1973).

This action was brought as a taxpayers' suit to enjoin payment of funds to five of the 18 private, non-profit institutions of higher education[2] receiving financial assistance under a Maryland statute. MD. CODE ANN. art. 77A, §§ 65-69 (A. 52-55). Relying upon the Establishment Clause of the First Amendment, and inspired perhaps by language in *Tilton v. Richardson*, 403 U.S. 672, 683 (1971), the taxpayers described the five "institutional defendants" (including Western Maryland College) in their complaint as "sectarian, educational institutions which are engaged in the teaching and practice of religion and a substantial purpose or activity of which is the inculcation of religious values * * *" (R. 18). The complaint further alleged:

> Each of the institutional defendants is a sectarian, educational institution which is engaged in the teaching and practice of religion and a substantial purpose of which is the inculcation of religious values. Each of the institutional defendants is controlled in whole or in part by a particular church. Each of the institutional defendants compels obedience to the dogmas and doctrines of a particular religion, requires instruction in theology and doctrine, and does everything it can to propagate religion (R. 19-20).

The complaint made no other allegations relating to Western Maryland College.

In its answer (R. 337-39), Western Maryland College denied the above-quoted allegations and thus challenged its status as an "institutional defendant." Taxpayers were afforded every opportunity to support their pleadings and, indeed, they required the College to answer four sets of

[2] In addition to the five appellee colleges, the other aid recipients (accounting for 75% of the funds granted by the Board of Public Works) include Johns Hopkins University, the University of Baltimore, Goucher College, Maryland Institute of Art, Hood College, Washington College, Capital Institute of Technology, St. John's College, Peabody Conservatory of Music, and four others.

interrogatories (R. 165, 444, 513, 578), produce more than 200 documents for their inspection (R. 466), and submit to two depositions of its officers. On the basis of their own extensive pre-trial discovery, and in response to comprehensive interrogatories served by the College (R. 468-79), taxpayers filed sworn answers on the eve of trial. These answers (R. 605-67) disclaimed each and every material allegation which their complaint had asserted against the College:

> 9. Plaintiff contends that all of the defendant institutions in this case *except for Western Maryland College* are sectarian. Plaintiff makes no contention as to non-defendant institutions.
>
> 10. Based upon the information obtained through discovery in this case, plaintiff does *not* contend that Western Maryland College is a sectarian institution.
>
> 14. Based upon the information obtained through discovery in this case, plaintiff does *not* contend that Western Maryland College requires attendance at religious activities.
>
> 16. Based upon the information obtained through discovery in this case, plaintiff does *not* contend that Western Maryland College requires obedience to religious doctrines.
>
> 18. Based upon the information obtained through discovery in this case, plaintiff does *not* contend that Western Maryland College requires attendance at religious instruction.
>
> 20. Based upon the information obtained through discovery, plaintiff does *not* contend that Western Maryland College holds itself out as an integral part of the religious mission of the Methodist Church.
>
> 22. Based upon the information obtained in discovery in this case, plaintiff does *not* contend that Western Maryland College inculcates religious values as a substantial purpose of the College.
>
> 26. Based upon the information obtained through discovery, plaintiff does *not* contend that Western Maryland College imposes religious restrictions on subjects or methods of instruction.

> 28. Based upon the information obtained through discovery in this case, plaintiff does *not* contend that Western Maryland College has attempted or is attempting to propagate a particular religion.
>
> 32. Based upon the information obtained through discovery in this case, plaintiff does *not* so contend [that prayer is recited in connection with classroom exercises].
>
> 33. Based upon the information obtained through discovery in this case, plaintiff does *not* so contend [that Western Maryland College is controlled in whole or in part by the Methodist Church].
>
> 35. Based upon the information obtained through discovery in this case, plaintiff does *not* so contend [that any practice or activity of a religious nature has operated to impair or restrict academic freedom of any student or faculty member of Western Maryland College].

Taxpayers did preserve two issues for resolution at trial. First, they suggested that the admissions policies had the effect of perpetuating a religious quota favorable to Methodists (R. 605-667, ¶12). At trial this contention was refuted by direct testimony of the dean of admissions (T. 1743-1800) and by expert analysis of admissions statistics covering a five-year period (T. 1805-43). This evidence demonstrated that recruitment and admissions decisions are made without regard to religious preferences of prospective students (R. 1110-18). The correctness of the District Court's express finding (A. 43-44) is not questioned on this appeal, insofar as it applies to Western Maryland College. Jurisdictional Statement, at 20-21.

The other issue reserved by taxpayers, in their answers to interrogatories, was a limited contention as to faculty hiring practices. While admitting that faculty appointments and promotions are generally not influenced by religious con-

siderations, taxpayers asserted "that all teachers of Religion are Methodist ministers" and "reserve[d] the right to determine [at trial] whether this is a religious restriction on faculty appointments" (R. 605-667, ¶24). At trial, however, taxpayers produced no further evidence on the subject and called no witnesses at all.

Because the latter issue brought focus upon its Department of Philosophy and Religion, the College introduced testimony by its president, the dean of the faculty, and two of the four departmental instructors. The record is undisputed that these four instructors were hired to the faculty not as clergymen but as competent scholars who hold doctorate (Ph.D.) degrees in non-religious subjects (R. 1125-27). Each of them competed for faculty appointment on the basis of superior academic qualifications and teaching potential, rather than because of religious preference (R. 1125-27, T. 17-19-21, 1727, 1728, 1736, 1740-42, 1851). The evidence also demonstrated, without contradiction, that all 24 courses in the Department (including the 12 concerning religion) are taught as academic disciplines as part of a liberal arts core curriculum, without any pro-Methodist "slant" or attempt to foster religious belief in students (A. 38-40, R. 1121-24, T. 1718, 1722, 1724-25, 1736-37, 1851, 1861, 1875, 1878). It is also undisputed that no student is obligated to take any course in religion (much less Christianity), but may satisfy graduation prerequisites by electing any one of several courses in philosophy. (A. 46, R. 1122-23, T. 1718, 1724).[3] Religion majors are few in number and constitute less than 2% of any graduating class (R. 1123, T. 1724, 1776-79, 1860-61).

[3] A statement in the District Court's opinion that theology or its equivalent "is a required course at each school" (A. 13) is a contradiction of that Court's own express finding of fact that no such course is required at Western Maryland College (A. 46 n. 7).

On the question of faculty selection, the District Court found no evidence of religious discrimination or favoritism (A. 41). On this appeal, taxpayers argue the contrary as to three of the appellee colleges but advance no such argument against Western Maryland College. Jurisdictional Statement, at 20.

After trial on the merits, during which taxpayers voiced no objection to the admission in evidence of their answers to interrogatories (T. 1676), the District Court issued findings of fact and entered judgment (A. 57-58), from which taxpayers have appealed (A. 59). Although writing in dissent, Circuit Judge Bryan nonetheless concurred in the result as to Western Maryland College:

> * * * I find it is no longer a church-affiliated or church-related institution within the scope of the constitutional inquiry now before the court. Plaintiffs in answer to this defendant's interrogatories explicitly disclaimed any contention that it is a school of that character and also disclaimed other immediately related aspects of the school's structure. * * *

(A. 26). As to Western Maryland College, then, the judgment below was unanimous.

ARGUMENT

To the extent that it purports to raise questions under the Establishment Clause, this appeal is controlled by principles declared in *Tilton v. Richardson*, 403 U.S. 672 (1971), and more recently in *Hunt v. McNair*, 413 U.S. 734 (1973), both of which upheld governmental programs of financial assistance to private institutions of higher education. The decision below, in upholding Maryland's program (as construed), signals no such departure from those principles as to require plenary review in this Court. See *Americans United for Separation of Church and State v. Bubb*, 379 F. Supp. 872 (D. Kan. 1974) (three-judge court).

But even if *Tilton* and *Hunt* are not wholly dispositive, the judgment may nonetheless be affirmed summarily as to Western Maryland College. This aspect of the case is patently devoid of merit. It was stripped of all vitality when the taxpayers abandoned their controversy against that particular College by disclaiming every material allegation against it. Even the dissenting judge has acknowledged that the conceded facts resolve any constitutional doubts as to that College. In short, this appeal is not merely insubstantial; as to Western Maryland College it is vexatious.

Taxpayers invite this Court to "assume that the appellee institutions conform to the *Tilton* colleges" (Jurisdictional Statement, at 8), but conveniently ignore their disclaimer of essential *Tilton* facts. *Tilton* and *Hunt* challenged — unsuccessfully — "institutions with admittedly religious functions" which were "governed" by sponsoring churches. *Tilton*, 687-88; *Hunt*, 743-44. But taxpayers withdrew such contentions against Western Maryland College. They have acknowledged that the College is not controlled in whole or in part by any church; they have disclaimed that it is attempting to propagate religion or inculcate its students with religious values. *Supra*, at 4-5, ¶¶20, 22, 28, 33. These record facts were corroborated by the sworn testimony of leading College representatives (T. 1722, 1736-37, 1861-64, 1875-78, 1884-85, 1891-92, 1901-07, 1910-11, 1916-17).

In *Tilton* and again in *Hunt*, a three-pronged test of the Establishment Clause was applied:

> First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administrative of the Act foster an excessive government entanglement with religion?

Tilton, 679; *Hunt*, 740. The secular purpose of the Maryland statute is not challenged on this appeal. The "primary effect"

and "entanglement" criteria, as applied to Western Maryland College, serves only to underline the futility of this branch of the appeal. In order to show a "primary effect", it was incumbent upon taxpayers to demonstrate that governmental aid "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission". *Hunt*, 743. Similarly, "entanglement" depends "in very large measure with the extent to which religion permeates the institution". *Id*, 745. Since this record forecloses any contention that religion "pervades" or "permeates" Western Maryland College, there remains no question involving the College which deserves plenary review.

We invite the Court's attention to a recent opinion by a three-judge court in *Americans United for Separation of Church and State v. Bubb*, 379 F. Supp. 872 (D. Kan. 1974). In an analysis of *Tilton* and *Hunt* at least as searching as that undertaken below, the *Bubb* court proposed an eight-part standard for evaluating the 19 private colleges involved in that case (five of which were declared ineligible under that test). We recite each of the *Bubb* inquiries (together with the corresponding disclaimers set forth in taxpayers' answers to interrogatories):

> First, does any "College impose religious restrictions on admission of students?" *Bubb*, 892. (Taxpayers do not contend on this appeal that Western Maryland College imposes such restrictions. Jurisdictional Statement, 20-21, *Supra*, at 5).
>
> "A second consideration is whether the Colleges require attendance of pupils at religious activities." *Bubb*, 892. (Interrogatory answer 14 expressly disclaimed "that Western Maryland College requires attendance at religious activities". *Supra*, at 4).
>
> "Third, do any Colleges require obedience by students to the doctrines and dogmas of a particular faith?" *Bubb*, 892. (Interrogatory answer 16 expressly disclaimed

"that Western Maryland College requires obedience to religious doctrines". *Supra*, at 4).

"Fourth, do Colleges require pupils to attend instruction in the theology or doctrine of a particular faith?" *Bubb*, 893. (Interrogatory answer 18 expressly disclaimed "that Western Maryland College requires attendance at religious instruction". *Supra*, at 4).

"Fifth, are the Colleges an integral part of the religious mission of the church sponsoring them?" *Bubb*, 893. (Interrogatory answer 20 expressly disclaimed "that Western Maryland College holds itself out as an integral part of the religious mission of the Methodist Church." *Supra*, at 4).

"Sixth, do the Colleges have as a substantial purpose the inculcation of religious values?" *Bubb*, 893. (Interrogatory answer 22 expressly disclaimed "that Western Maryland College inculcates religious values a substantial purpose of the College." *Supra*, at 4).

"Seventh, do the Colleges impose religious restrictions on faculty appointments?" *Bubb*, 893. (Taxpayers do not contend on this appeal that Western Maryland College imposes such restrictions. Jurisdictional Statement, 20. *Supra*, at 5-7).

"Finally, do the Colleges impose religious restrictions on what or how the faculty may teach?" *Bubb*, 893. (Interrogatory answer 26 expressly disclaims "that Western Maryland College imposes religious restrictions on subjects or methods of instruction." *Supra*, at 4-5).

Far from posing justiciable issues of constitutional dimensions, this branch of the appeal marks only a routine failure by a litigant to make out a case against his adversary. It should be excised accordingly by summary affirmance. The burden was unquestionably upon the taxpayers to prove the extent to which the colleges were "church-related", if at all. *Hunt v. McNair*, 413 U.S. 734, 746 n. 8 (1973); *Board of Education v. Allen*, 392 U.S. 236, 248 (1968). As one of

the named defendants, Western Maryland College was entitled to learn through discovery the factual basis of the claims against it in order to prepare its defense. Taxpayers responded on the eve of trial by disclaiming, in sworn answers to interrogatories, every material allegation in their complaint directed against that College. In effect, they proclaimed under solemn oath that the College was free to ignore the allegations so withdrawn.

By including Western Maryland College in their appeal, taxpayers seek to resurrect those allegations and to require the College to explain or justify practices which they now claim to be inconsistent with the Establishment Clause. But this attempt simply ignores an admonition delivered, in an analogous context, on the very day that *Hunt* was decided: "No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law". *Norwood v. Harrison*, 413 U.S. 455, 471 (1973).

CONCLUSION

For the foregoing reasons, we respectfully submit that as to this appellee, Western Maryland College, the judgment of the District Court is correct and should be affirmed without further briefs or argument.

Respectfully submitted,

JOHN H. MUDD,
H. THOMAS HOWELL,
Attorneys for Appellee,
Western Maryland College.

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